

**BEFORE THE
FEDERAL MARITIME COMMISSION**

DOCKET NO. 15-11

IGOR OVCHINNIKOV, IRINA RZAEVA, and DENIS NEKIPELOV,

– vs. –

**MICHAEL HITRINOV a/k/a
MICHAEL KHITRINOV,
EMPIRE UNITED LINES CO., INC., and CARCONT, LTD.**

INFORMAL DOCKET NO.: 1953(I)

KAIRAT NURGAZINOV,

– vs. –

**MICHAEL HITRINOV a/k/a
MICHAEL KHITRINOV,
EMPIRE UNITED LINES CO., INC., and CARCONT, LTD.**

**COMPLAINANTS' RESPONSE TO RESPONDENTS' MOTION TO
CORRECT THE RECORD**

Pursuant to Rules 69, 71 and 201 of the Federal Maritime Commission's ("FMC") Rules of Practice and Procedure 46 C.F.R. 502 *et seq.*, Complainants, by their Counsel, Marcus A. Nussbaum, Esq. hereby respond to Respondents' August 16, 2016 Motion to Correct the Record.

RELIEF REQUESTED

This Response is respectfully submitted to the Respondents Motion to Correct the Record, which, while not captioned as such, is a separately filed motion seeking similar relief sought by non-appearing non-party Sergey Kapustin ("Kapustin") to "Seal Confidential Documents". It is noted that this is the *second* motion filed with respect to documents produced in this matter, in

which the movants, without stating so directly, seek an Order of Preclusion, or alternatively, a ruling from the Presiding Officer as to the relevance, weight, credibility, and admissibility of said documents prior to the hearing in this matter, in violation of the Commission's Rules of Practice and Procedure.

RECENT PROCEDURAL HISTORY

On August 16, 2016, Respondents filed the instant Motion to Correct the Record, seeking that Complainants "withdraw two substantially misleading Appendices and related statements" in their August 9, 2016 Reply to Respondents' Response to Order for Parties to Supplement the Record.

On August 19, 2016, non-party Kapustin filed a similar motion to "Seal Confidential Documents", which are the same documents at issue herein.

BRIEF STATEMENT

The conclusory and self-serving argument proffered by Respondent Hitrinov and the attorney representing him in the "Global" matter, Jon Werner, Esq., provide no basis for the relief improperly sought by the Respondents and non-party Kapustin. In the first instance, and by way of Complainants' Status Report of August 18, 2016, the Presiding Officer has already been briefed on the fatal defects in Hitrinov's *undated* Affidavit which apparently bears a forged signature. In the same vein, the Socratic musings of Respondents' counsel, Mr. Jeffery, as to what documents complainants' counsel "should have" produced in this matter; the *timing* of said production; the *relevance* of said production; and the "law and facts of this case according to Mr. Jeffery" similarly fail to provide a basis for an order of preclusion.

It is, however, notable that both Respondents and non-party Kapustin both take issue with the production of these documents, as well as the potentially damning implications arising from

the information contained therein. As set forth below, the Commission’s Rules of Practice and Procedure (the “FMC Rules”), as well as the Federal Rules of Civil Procedure warrant the denial of Respondents’ motion (as well as Kapustin’s motion addressed separately), in its entirety.

ARGUMENT

Standard of Review

Relevancy

Federal Rules of Civil Procedure (“FRCP”) Rule 26(b) reads, in relevant part, as follows:

“...Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. **Information within this scope of discovery need not be admissible in evidence to be discoverable.**” Fed. R. Civ. P. 26(b) (emphasis added).

FMC Rule 201 similarly reads, in relevant part, as follows:

“... Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the presiding officer may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at hearing if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”

Admissibility

Subpart J of the Commission’s Rules which governs hearings in this matter, contains FMC Rule 156, which reads, in relevant part, as follows:

“In any proceeding under the rules in this part, all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible.”

Relevance is Broadly Construed

It is well settled that relevance under FRCP Rule 26 is "...construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." See, Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978); ("relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

It is additionally well settled that District Courts construe Rule 26(b)(1) liberally to provide for a "broad vista of discovery." See, Tele-Radio Systems Ltd. v. DeForest Elec., Inc., 92 F.R.D. 371, 375 (D.N.J.1981); see also, Horizons Titanium Corp. v. Norton Co., 290 F.2d 421, 425 (1st Cir.1961); ("Rule 26(b) apparently envisions generally unrestrictive access to sources of information, and the [C]ourts have so interpreted it"). Each party is given an opportunity "...to scrutinize all relevant evidence so that each will have a fair opportunity to present its case at trial." See, Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 135 F.R.D. 101, 104 (D.N.J.1990) (citing Goldy v. Beal, 91 F.R.D. 451, 454 (M.D.Pa.1981).

Accordingly, and in that the documents produced by Complainants are directly related to the subject automobiles, and that said documents identify the Complainants by name, invoice number, beneficiary name, as well as the subject vehicles by make, model, year, and vehicle identification ("VIN") number, said documents fall within the broad penumbra of relevancy squarely within the meaning of the case law cited above. Additionally, and to the extent that such documents may ultimately be deemed inadmissible *at the time of the hearing in this matter*, it cannot be disputed that this discovery does indeed lead to the discovery of admissible evidence. As such, the Respondents have abjectly failed to offer any basis whatsoever that would warrant an order of preclusion from the Presiding Officer with respect to said documents.

The Parties Have Yet To “Conduct Discovery” In This Matter

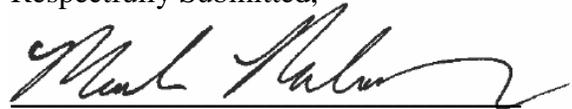
The Presiding Officer is also well aware that the parties have yet to conduct any discovery herein (with the exception of that limited discovery as Ordered by the Presiding Officer) and that the sole issues currently at hand are those of the FMC’s jurisdiction over this case and the Complainants’ standing to allege Shipping Act violations. Depositions have not yet been held, nor are the parties anywhere near the point at which rulings as to the admissibility of evidence are to be made (and as set forth above, to be made at the time of the hearing of this matter). As such, it is additionally respectfully submitted that the instant relief sought by Respondents, while not by any means warranted, is premature.

CONCLUSION

As set forth above, Respondents have attempted to usurp the Presiding Officer’s role in making determinations as to the relevance, weight, credibility, and admissibility of various documents prior to the hearing in this matter, in violation of the Commission’s Rules of Practice and Procedure. Neither Jon Werner, Respondent Hitrinov, non-party Kapustin, nor *their* counsel Mr. Jeffrey are clothed with the robes of the Presiding Officer. Accordingly, Respondents motion for an order of preclusion, or alternatively for a ruling from the Presiding Officer as to the relevance, weight, credibility, and admissibility of said documents, should be denied in its entirety.

Dated: Brooklyn, New York
August 23, 2016

Respectfully Submitted,



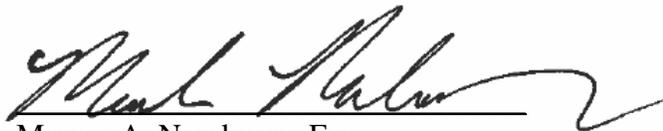
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the **COMPLAINANTS' RESPONSE TO RESPONDENTS' MOTION TO CORRECT THE RECORD** upon Respondents' Counsel at the following address:

Nixon Peabody LLP
Attn: Eric C. Jeffrey, Esq.
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by first class mail, postage prepaid, and by email (ejeffrey@nixonpeabody.com).



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Dated: August 23, 2016 in Brooklyn, New York.